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VIA ELECTRONIC FILING AND FACSIMILE

Hon. Joseph F. Bianco
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: FragranceNet.com, Inc. v. FragranceX.com, Inc., CV-06-2225

Dear Judge Bianco:

We represent FragranceNet.com, Inc. ("FragranceNet"), plaintiff in the referenced action. This letter responds to defendant FragranceX.com, Inc.'s ("FragranceX") letter to his Honor of June 28, 2006.

At 5:40 p.m. yesterday, we received an Order from the Court granting defendant FragranceX's request for a pre-motion conference. We respectfully request that the Court reconsider that Order in so far as it was granted before we had an opportunity to respond, and given that the cases make it clear that defendant's proposed motion would be futile.

Defendant FragranceX has requested leave to move to dismiss the Amended Complaint on the basis that it does not (a) individually list or depict each of the more than eight hundred (800) photographs that defendants have infringed; or (b) identify the specific time during which defendants infringed FragranceNet's copyrights in those works. That request is nothing more than a stalling tactic and any such motion would waste the time and resources of both this Court and the parties.

The Amended Complaint contains copies of copyright registration certificates covering all of the infringed works, as well as photographs of fifty (50) of the infringed works. It also describes those works and provides the Web address where they are posted. Any claim by FragranceX that the Amended Complaint does not specify the infringed works with sufficient particularity is disingenuous, at best. We are advised that after the Amended Complaint was filed, defendant FragranceX identified -- without any assistance from FragranceNet -- most, if not each and every one, of the eight hundred (800) or more photographs that are at issue in this action and removed them from its site. That clearly illustrates that the Amended Complaint provides sufficient notice to defendants of the

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works at issue, as required by Rule 8(a). Otherwise, how would defendant FragranceX have known which photos to take down from its site?

Contrary to defendant FragranceX's assertion, FragranceNet has properly identified the time during which its works were infringed, namely, from at least as early as August 1, 2005. No heightened pleading requirement is required in this action. *U2 Home Entertainment, Inc. v. Lai Ying Music & Video Trading, Inc.*, 2005 WL 1231645 (S.D.N.Y. 2005) (discussed below). *See also* Fed. R. Civ. P. 9(b); *Leatherman v. Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993) (Finding that Rule 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief" for claims not subject to heightened pleading requirement of Rule 9(b)); *Mid America Title Company v. Kirk*, 991 F.2d 417, 421-22 (7th Cir. 1993) (citing *Leatherman* and holding that copyright claims need not be pled with particularity).

In *U2 Home Entertainment, Inc.*, Judge Cote denied a motion to dismiss in a factually analogous case, and granted summary judgment in plaintiff's favor. 2005 WL 1231645 (S.D.N.Y. 2005). That case involved the infringement of plaintiff's copyrights in and to numerous motion pictures. In that case, the complaint specifically identified seven (7) of the motion pictures being infringed, and claimed that defendant also infringed plaintiff's registered copyrights in several other unspecified motion pictures. *Id.* A list of all of plaintiff's copyright registrations was attached to the complaint. *Id.* Following the Seventh Circuit's decision in *MidAmerica Title Co.*, Judge Cote held that "that the Complaint contains an unrestrictive clause providing for the inclusion of other motion pictures not listed in Exhibit A does not cause the Complaint to run afoul of Rule 8's liberal pleading standard." She also found that by identifying the time during which the infringement occurred as within "the past three years," plaintiff "states the basis for recovery with sufficient clarity." *Id.* at *9.

In view of the foregoing, we respectfully request that his Honor deny defendant FragranceX's request for a pre-motion conference on its proposed motion to dismiss. At a minimum, we respectfully request that his Honor require defendant to file an Answer.

Respectfully submitted,

Catherine M. Clayton
for PAUL, HASTINGS, JANOFSKY & WALKER LLP

CMC:bf

cc: David Rabinowitz, Esq. (via facsimile - 212.554.7700)
Robert L. Sherman, Esq.